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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 141

A. LESTER MARKS, ELIZABETH LOY MARKS and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ or certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered March 5, 1951. A petition for rehearing was filed on May 3, 1950 and denied on May 15, 1951.[1]

OPINION.

The opinion of the Court of Appeals (R. 404-420) is reported in 187 F. 2d 724. The findings of fact and conclusions of law of the District Court (R. 14-18) are unreported.

JURISDICTION.

Judgment of the Court of Appeals was entered on March 5, 1951 (R. 420). A petition for rehearing was filed on May 3, 1951 and denied on May 15, 1951 (R. 421). The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED.

(1) Does the Hawaiian Organic Act permit the United States to take public lands under lease from

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[1]Because of the importance to the Territory in administering the public land laws and alarmed at the opinion of the court below which "throws a cloud upon many land transactions" the Attorney General filed a brief as amicus curiae so that "upon a more full consideration of the governing laws this cloud will • • • be removed." (Brief of Territory of Hawaii in support of Petition for Rehearing, p. 26). Rehearing was denied without opinion. Petitioners have requested the clerk of the court below to transmit copies of the Attorney General's brief with the record for the use of this Court in considering this petition.

the Territory to a private person without compensation to the lessee despite the provisions of his lease?

(2) Does the term "public purposes" in the withdrawal clause of the leases in question include "purposes of the United States"?

(3) Is the term "combat activities" as used in Private Law 433, 80th Cong., 2d Sess., so clear that the unequivocal finding of the committee reporting on the bill may be disregarded?

STATUTES.

The pertinent statutory provisions are printed in the appendix.

STATEMENT.

This case involves two points of statutory construction, one of vast public importance to the Territory in the administration of its public lands and the other affecting the relationship of the Courts and Congress.

Petitioners, prior to December 7, 1949, operated a ranch on the island of Oahu, Territory of Hawaii, consisting of certain fee simple holdings and two leases from the Territory comprising 4792 acres (R. 42). On December 9, 1941, the Army moved in, tore down fences, cut pipe lines, and destroyed water troughs resulting in the loss and dispersal of petitioners' livestock (R. 47-48, 52, 53, 77, 127, 128).

On July 2, 1942, the Commissioner of Public Lands advised petitioners that General Emmons requested the lands under lease to them "be made immediately available to the Army for war purposes" and that therefore General Lease No. 1440 was cancelled effective June 29, 1942 (Joint Ex. B-2, R. 34, 36). A month later, a similar letter was sent cancelling Lease No. 1741 (Joint Ex. C-3, R. 37, 38). In the early days of the war, petitioners and the Army were in joint possession, but in June, 1942 petitioners were evicted (R. 63-66).

By Private Law 433, Congress endeavored to relieve petitioners of the losses incurred by the Army's seizure of their property by consenting that respondent be sued in the District Court.

The District Court found (R. 14-18) that petitioners' livestock had been damaged as described by the committee reporting on the bill[2]; that the damage was not the result of "combat activities"; and that the cancellation of the lease was wrongful. Accordingly it entered judgment for petitioners in the sum of $65,894.29. (R. 19.)

The Court of Appeals reversed the judgment of the District Court. It held that the United States, under Sec. 91 of the Hawaiian Organic Act (48 U.S.C., Sec. 511) could withdraw public lands leased by the Territory to private persons without compensation despite the terms of the lease. It held also that the acts of the Army taking petitioners' ranch were "com-

[2]H. R. Rep. No. 2063, 80th Cong., 2d Sess. (1948).

bat activities" within the meaning of the proviso of Private Law 433. It concluded that the term "combat activities" was so clear it could ignore the House Report which unequivocally stated that the acts of the Army described in the report were not "combat activities."

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that Sec. 91 of the Hawaiian Organic Act permitted the United States to take petitioners' leaseholds of public lands without compensation;

(2) In holding that the withdrawal clauses in the leases in question permitted a withdrawal of the lands for purposes of the United States;

(3) In holding that the damage to petitioners' livestock arose out of "combat activities" within the meaning of Private Law 433, when the very purpose of the act and its legislative history make it clear that the acts of the Army causing the damage were not within the scope of that expression as used by Congress;

(4) In ignoring the findings of fact of the District Court and making contrary findings of fact unsupported by the evidence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The opinion below deals with two acts of Congress: (a) the Hawaiian Organic Act, and (b) a private act passed to enable petitioners to establish their claims of damage in a District Court. The court below has construed both statutes in a manner which utterly defeats the legislative will. This Court should grant certiorari for the following reasons:

(1) The opinion below holds that despite the fact Congress has empowered the Land Commissioner to lease the public lands of Hawaii for a term of years, respondent by executive order, can at any time cancel the lease and oust the lessee from the premises without compensation. Leases and other land transactions entered into by the Territory and numerous persons in Hawaii during the past 50 years will be reduced to tenancies at will if the opinion below stands. This construction of the Hawaiian Organic Act (if uncorrected) will frustrate the elaborate scheme which Congress established for administering our public lands. It casts a cloud on numerous transactions.

Its construction is opposed to the opinions of lawyers and public officers who have dealt with the act for years including that of Assistant Attorney General Willis Van Devanter who, in 1900, advised the Secretary of the Interior and the governor of Hawaii at length on the powers of officers of Hawaii to sell and lease public lands. It is also contrary to the opinion of the present Attorney General of Hawaii. This is a sweeping change in the whole public lands system of this Territory.

Under the Newlands Resolution (30 Stat. 750), the public land laws of the United States were not extended to Hawaii but instead it was provided that Congress should enact "special laws" for the management and disposition of public lands in the Territory. This Congress did by the Act of April 30, 1900 (31 Stat. 141), Sec. 73 (48 U.S.C., Secs. 663 to 677) of which provided in detail the statutory scheme for administration of public lands and continued in effect the public land laws of the Republic of Hawaii except where otherwise specifically provided (Sec. 73(c), 48 U.S.C., Sec. 664).

Under Sec. 73 and the laws of the Republic of Hawaii thus continued in force, the Commissioner of Public Lands has power to create a number of types of vested interests[3] including fees and leaseholds for a term. The holding of the court below was that because of Sec. 91 of the Hawaiian Organic Act (48 U.S.C., Sec. 511) providing that:

> Except as otherwise provided the public property ceded * * * shall remain in the possession,

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[3](a) Land patents, grants and deeds, Hawaiian Organic Act, Sec. 73(c); Civil Laws 1897, Sec. 200-202; Revised Laws Hawaii 1945, Sec. 4514-4516.

(b) Four types of Homestead Leases or Agreements, Sec. 73 (c), (f), (g), (l), (m), (n), (o), (p) and (q) of the Hawaiian Organic Act; Secs. 201, 216, 219, 245, 248, 252, Civil Laws of Hawaii 1897; Revised Laws Hawaii 1945, Sec. 4565, 4570, 4573, 4597, 4599, 4601.

(c) Agreements for sale within the scope of Sec. 73(l) of the Hawaiian Organic Act.

(d) Non-agricultural leases of 21 years. Sec. 73(c), Hawaiian Organic Act; Sec. 203, Civil Laws Hawaii 1897; Revised Laws Hawaii 1945, Sec. 4544.

(e) Agricultural leases for 15 years. Sec. 73(d), Hawaiian Organic Act.

> use and control of the government of the Territory of Hawaii and shall be maintained, managed and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii * * *

any interest granted by the Territory to private persons (except a fee) could be taken by the United States without compensation.

This holding below renders such interests (authorized by Congress, under Sec. 73 and the laws of the Republic, to be created by the public officers of Hawaii) subject to destruction at will without compensation and creates a hitherto unsuspected congenital defect in titles obtained from the Territory. The judgment below casts a cloud on numerous transactions.[3a] It impairs the power of the Territory to administer the public domain.

The court below construed Sec. 91 as giving the United States the power to take possession of leased public lands without compensation to the lessee regardless of the terms of the lease. Even a cursory reading of Sec. 91 discloses that this construction is erroneous. The expression relied on by the court says "except as otherwise provided" ceded public lands are to remain in the possession of the Territory until other disposition is made by Congress or until taken

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[3a]Transactions affected by the decision below run into the thousands; there are 775 leases alone, containing 491,000 acres of land subject to similar withdrawal covenants.

for the purposes of the United States. No one denies that the Territory under Sec. 73 had the power to lease these lands and surely it cannot be doubted that after lands are leased to others they are no longer "in the possession" of the Territory. The clause in question makes it clear that lands subject to withdrawal for the purposes of the United States are lands "in the possession" of the Territory, not lands in the possession of someone else. The lands in question were lands not "in the possession" of the Territory because possession had been delivered over to petitioners under their leases.

If the Court of Appeals' construction of Sec. 91 is correct, then that section is in conflict with Sec. 73(d) of the Hawaiian Organic Act which provides that leases of "lands suitable for the cultivation of sugar cane" can be made without a clause allowing withdrawal for homestead or public purposes in which event it is expressly stated that "land so leased shall not be subject to withdrawal."

If such interests are subject to destruction at will, then the leases of sugar lands under Sec. 73(d), right of purchase leases under Sec. 73(f) or homestead leases have become mere tenancies at will and the whole attempt of Congress by Sec. 73 of the Hawaiian Organic Act to set up an orderly administration of public lands in Hawaii is frustrated.

Congress delegated to the Commissioner of Public Lands by Sec. 73 the power to lease public lands. The sovereign cannot, under the law, destroy the interests

created by such leases without compensation, for when the sovereign enters a contract it assumes the role of a private individual and stands before the law as any contracting party.

Before the 1941 amendment, it was Sec. 73 that conferred the power of withdrawal of land from leases and that was only a power to withdraw for *territorial* purposes. After the withdrawal took place, the affected land resumed the status of "public lands" to be "managed as may be provided by the laws of the Territory." (Sec. 73(q), 48 U.S.C. 677.)

Sec. 91[4] has nothing to do with the withdrawal of land from leases. This section applied only to withdrawals of land from the category of "public lands."

In support of its conclusion to the contrary on this point, the court below relied on an erroneous dictum from its earlier opinion in *United States v. Chun Chin,* 150 F. 2d 1016, as a holding that Sec. 91 gave authority for the withdrawal of land from leases; that it was no such holding was evident from the fact that neither counsel cited the case below and when it was referred to in argument, government counsel agreed that it had no application. The holding of the *Chun Chin* case is that a condemnation proceeding was not an appropriate action to assert

[4]For reasons known only to the compiler of the United States Code, Sec. 91 of the Hawaiian Organic Act was brought forward to become 48 U.S.C. 511, while the earlier Sec. 73 stating the basic detail of our land law was rearranged to follow Sec. 91 and became 48 U.S.C. 663-677. Possibly the compiler's rearrangement may have misled the court below as to the prominence of Sec. 91.

a lessee's claim for damages.[5] The answer to the procedural holding of the *Chun Chin* case is that this case is an appropriate proceeding to enforce a lessee's claim for damages since it is based upon a private act and not asserted in condemnation.

If the construction of the Hawaiian Organic Act remains uncorrected by this Court our whole elaborate system of administering public lands is jeopardized. No one would ever take a leasehold from the Territory if he thought that at any moment his lands and the valuable improvements placed on them could be taken for the use of the federal government by executive order without compensation.[6]

The subsidiary ground holding that respondent could take over the leaseholds by executive order under the terms of the leases is untenable. The covenant in the lease (a standard form[6a] in territorial leases) provided that the lands in question might—

> * * * be withdrawn from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or road-

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[5]It should be noted that the author of the opinion of the *Chun Chin* case was the author of the opinion in the case at bar. Possibly this accounts for the unwillingness of the lower court to correct its earlier erroneous dictum.

[6]We point out that the Hawaiian Organic Act is a federal statute of particular application to Hawaii; a statute under which no conflict among the circuits can ever arise. Hence the havoc wrought by the judgment below to our organic law can never be corrected unless the case is brought here.

[6a]See footnote 3a ante.

> way purposes, or for any public purpose, or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, *and possession resumed by the Lessor,* * * *. (Emphasis supplied.) (R. 35, 36.)

The court construed the phrase "any public purpose" to include public purposes of the United States. This very language was construed by the Supreme Court of Hawaii in *Ai v. Bailey,* 30 Haw. 210 (1927), to be governed by the canon *noscitur a sociis.* Since the specific public purposes set forth are territorial purposes, the phrase "any public purpose" obviously means any *territorial* public purpose, not any public purposes of the United States.

Any other construction of the withdrawal covenant would render the language of the covenant "and possession resumed by the Lessor" (i.e., the Commissioner of Public Lands) meaningless.

Another reason given by the court below to justify the result was that in 1929, petitioners' predecessor in title consented to a withdrawal of 8.84 out of the whole area of 4792 acres (R. 173) and that this was a construction of the lease binding on the parties in this case. No evidence was adduced as to the circumstances surrounding it. To say that the lessee's acquiescence in a *de minimis* withdrawal thereby waives his right to resist confiscation of the whole, reduces a rule of construction to an absurdity. The two subsidiary bases for the court's conclusion on this point are without merit.

(2) The court below has construed Private Law 433, 80th Cong., 2d Sess., so that petitioners are deprived of the remedy granted by the special act. By a disregard of the legislative history of the act it substituted its judgment for that of Congress when it held that the acts of the Army taking over petitioners' ranch and dispersing their cattle constituted "combat activities." This treatment of legislation is in direct conflict with both the majority and dissenting opinions of this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, decided May 21, 1951.

Congress was fully aware of the facts when it passed the jurisdictional bill. It wanted the court to pass on the amount of damages (which were in dispute) and the right to withdraw land discussed under (1) above. That it never intended such acts as the cutting of fences, destroying water troughs and dispersal of cattle to be considered as "combat activities" is clear from the committee report (H.R. Rep. No. 2063, 80th Cong., 2d Sess., 1948):

> In this connection, it should be pointed out that the Department of the Army have included in section 1 of the bill a proviso clause which would preclude judgment being rendered against the United States for the loss of personal property, including livestock, which arose out of the 'combat activities' of United States military personnel. This proviso seems unnecessary as no evidence was presented to your committee of any combat activities, as the term is generally understood, of military personnel in the areas in question. * * * Your committee by adopting the bill

> in its entirety, including the proviso, does not intend to relieve the United States of any liability for the claimant's loss of personal property including livestock, due to the activity of the United States forces, and if such losses are established by competent evidence to be the result of such activities the court is instructed to render judgment therefor. (H.R. Rep. No. 2063, p. 4.)

Thus it is clear that the acts proved and found by the District Court were precisely the facts before Congress when it authorized suit and were never thought to be within the phrase "combat activities." The Court of Appeals brushed aside the committee report in the following footnote:

> On this aspect, particularly, appellees stress the Report of the House Judiciary Committee accompanying the bill. The Report grew out of a subcommittee hearing at which only representatives of appellees appeared. We may note here a propensity in the Report to advise the court how the case should be decided. However, the court is obliged to apply the Act as it is written. Its terms are too plain to permit of recourse to extraneous evidence of the legislative intent. (R. 409.)

Thus by disregarding the legislative history of the act the labors of Congress were rendered futile. What the court below thought Congress was doing when it permitted suit remains a mystery. Obviously, the expression "combat activities" is not so crystal clear that it can be interpreted apart from the setting in which the expression is used (cf. *Johnson v. United*

States, 170 F. 2d 767, 770 (CA 9, 1948); *Skeels v. United States,* 72 F. Supp. 372, 374 (1947); *Jefferson v. United States,* 74 F. Supp. 209 (1947)).

Evidently the lower court thought that this was not the kind of a case in which a citizen should expect to be made whole. However, the wisdom of the act was not for the court. A committee of Congress has said these acts are not "combat activities," the District Court found that they were not, but the court below shuts its eyes to what was before Congress and ruled that the damage was a result of "combat activities" as a matter of law. Not only a proper regard for a coordinate branch of government, but also adherence to the opinions of this Court require that this case be reviewed.

Petitioners being squarely within the jurisdictional act enabling them to bring this suit, and having proved their case on all points of fact and law in the District Court have been denied their recovery by the Court of Appeals in a holding based upon the untenable construction of two acts of Congress. One (to the alarm of Hawaii's Attorney General) would upset the administration of public lands which has existed for half a century unchallenged until now and the other would nullify the plainly expressed intent of Congress. Both are clearly wrong, both are of such significance to require a review by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Honolulu, Hawaii,
June 18, 1951.

Respectfully submitted,
J. GARNER ANTHONY,
Counsel for A. Lester Marks, Elizabeth Loy Marks and Herbert M. Richards, Trustees of the Estate of L. L. McCandless, Deceased, Petitioners.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)

Private Law 433—80th Congress
Chapter 747—2d Session
H.R. 915

AN ACT

To confer jurisdiction upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment on the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear against the United States of America.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of $46,155, for the loss of personal property including the loss of livestock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of $67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war

purposes: Provided, That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Sec. 2. Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code, as amended: Provided, that suit hereunder shall be instituted within one year after the enactment of this Act: And provided further, That this Act shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, described in section 1 hereof, and not otherwise to affect any substantive rights of the parties.

Approved June 29, 1948.

The Hawaiian Organic Act[1] (Act of April 30, 1900, 31 Stat. 141, c. 339; 35 Stat. c. 124; 36 Stat. c. 258; 42 Stat. c. 42; 48 U.S.C. 511, 664-677).

Sec. 73(c)

(c) The laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. (48 U.S.C. 664.)

Sec. 73(d)

(d) No lease of agricultural lands or of undeveloped arid public land which is capable of being converted into agricultural land by the development, for irrigation purposes, of either the underlying or adjacent waters, or both, shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than fifteen years. * * * The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced in proportion to the value of the part so withdrawn. Every such lease shall contain a provision to that effect: *Provided,* That the commissioner may, with the approval of the governor and at least two-thirds of the

[1]Only relevant provisions of the Hawaiian Organic Act are quoted; for a compilation of the original act as it existed at the time the leases were executed, see: Revised Laws Hawaii 1935, pp. 35-67.

members of the land board, omit such withdrawal provision from the lease of any lands suitable for the cultivation of sugar cane whenever he deems it advantageous to the Territory of Hawaii. Land so leased shall not be subject to such right of withdrawal. (48 U.S.C. 665.)

Sec. 73(h)

Any land in respect of which any of the foregoing provisions shall be violated shall forthwith be forfeited and resume the status of public land and may be recovered by the Territory or its successors in an action of ejectment or other appropriate proceedings. (48 U.S.C. 669.)

Sec. 73(l)

No sale of lands for other than homestead purposes, except as herein provided, and no exchange by which the Territory shall convey lands exceeding either forty acres in area or $5000 in value shall be made. No lease of agricultural lands exceeding forty acres in area, or of pastoral or waste lands exceeding two hundred acres in area, shall be made without the approval of two-thirds of the board of public lands * * *. (48 U.S.C. 673.)

Sec. 73(q)

All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other

dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department by direction of the governor, and all patents and deeds of such land shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the land laws of Hawaii, as amended by this Act, shall, except as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory. (48 U.S.C. 677.)

Sec. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States

may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature; PROVIDED, That when any such public property so taken for the uses and purposes of the United States, if instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section. (31 Stat. 159, 48 U.S.C. 511.)

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 141

A. LESTER MARKS, ELIZABETH LOY MARKS AND HERBERT M. RICHARDS, TRUSTEES OF THE ESTATE OF L. L. MCCANDLESS, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 404-420) is reported at 187 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered March 5, 1951 (R. 420-421). A petition for rehearing was denied on May 15, 1951 (R. 421). The petition for a writ of cer-

tiorari was filed on June 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether damages to and loss of livestock arose out of the "combat activities" of military personnel of the United States, within the meaning of a special jurisdictional Act permitting petitioners to sue the United States.

2. Whether lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation and in the custody of the Territory may be withdrawn for the use of the United States Army without liability to those holding leases from the Territory pursuant to (a) Section 91 of the Organic Act or (b) the terms of the leases authorizing the withdrawal "for any public purpose."

STATUTES INVOLVED

1. Section 1 of an Act approved June 29, 1948 (R. 4-5) provides:

> That jurisdiction is hereby conferred upon the District Court of the United States for the Territory of Hawaii to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased [petitioners here], as their interests may appear, against the United States of America for damages, if any, but not exceeding the sum of $46,155, for the loss of personal property including the loss of live-

stock, alleged to have been caused by military personnel of the United States, and for damages, if any, but not exceeding the sum of $67,500 for the alleged illegal withdrawal of the Government lands covered by General Leases Numbers 1740 and 1741 of the Territory of Hawaii, each dated December 29, 1925, from the operation of those leases for use by the United States Army for war purposes: *Provided,* That judgment shall not be rendered against the United States with respect to any part of the alleged damages for the loss of personal property, including livestock, which arose out of the combat activities of military personnel of the United States.

Section 2 provides:

Proceedings for the determination of these claims shall be had in the same manner as in cases against the United States of which the district courts of the United States have jurisdiction under the provisions of section 24 of the Judicial Code as amended [now 28 U.S.C. section 1346]. *Provided,* That suit hereunder shall be instituted within one year after the enactment of this Act: *And provided further,* That this Act shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court to hear, determine, and render judgment upon the claims of the executors and trustees of the estate of L. L. McCandless, deceased, described in section 1 hereof and

not otherwise to affect any substantive rights of the parties.

2. The pertinent provisions of section 91 of the Hawaiian Organic Act, approved April 30, 1900, 31 Stat. 141, 159, as amended, 36 Stat. 443, 447, 48 U.S.C. 511, are found in the Argument, p. 10, *infra*.

STATEMENT

Pursuant to authority granted under a special jurisdictional Act of June 29, 1948, this suit was commenced December 14, 1948 (R. 5). The complaint (2-5, R. 12-14) alleged, first, that petitioners had sustained a loss of $46,155 because on December 7, 1941 "and immediately subsequently" Army personnel took possession of their ranch and by destroying fences, paddocks and corrals caused the livestock to scatter over the countryside (R. 12) and, second, that petitioners had sustained a further loss of $67,500 because General Lease No. 1740, which ran until December 29, 1946, was wrongfully cancelled as of June 29, 1942, and General Lease No. 1741, which had the same expiration date, was wrongfully cancelled as of December 29, 1942 (R. 12-13). The answer of the United States (R. 8-10) denied liability. As required by Section 2 of the jurisdictional Act, there was a trial before the district judge.

1. The testimony in respect of damages to livestock may be summarized as follows:

On December 7, 1941, the leased areas—4783.88 acres [1]—were used as a ranch. The land was improved by two houses. There were also fences and water troughs. (R. 43.) The livestock consisted of an estimated 1200 cattle (R. 46), 200 pigs (R. 53) and two horses (R. 52). Immediately after December 7, 1941, 15 soldiers, two non-commissioned officers, and a lieutenant entered the property (R. 127, 275). They strung barbed wire on the beach and erected gun emplacements (R. 128, 275). On December 14, another detachment of about 75 went in to patrol the area back of the beach (R. 274, 277).

About December 17, Mr. Marks, one of the petitioners and their only important witness on the issues now material, got up to the ranch for the first time since the attack. He testified: "The troops were * * * busy putting up barbed wire entanglements. They had torn down fences and were using any available material that could be used in the creation of their defensive positions. * * * there was an [expectancy] of a landing down there, and they were taking * * * every precaution that they could to be prepared for it" (R. 47, 48-49). However, as a result: "The fences were down. The wires had been cut. The pipe lines taking water to the troughs had been cut. In two instances that I remember the troughs

[1] Originally, the leases covered 4792.72 acres (R. 3) but 8.84 acres were withdrawn in 1929 by executive order (R. 102, 173, 418-419).

had been turned over, and in another instance where there was a permanent concrete watering trough a machine gun had been used to shoot the corner off of it. They seemed to think that mosquitoes were breeding in it." (R. 48.) And, Mr. Marks added, the cattle "just were dispersed" (R. 49); 200 pigs "just disappeared" (R. 53); and two saddle horses went through a cut fence onto a railway track and were killed (R. 52; see also R. 128).

2. The facts relevant to the cancellation of the leases are as follows:

Lease 1740 was dated December 29, 1925, and was for a term of 21 years. It contained the following provision (R. 35-36):

> It Is Mutually Agreed, That at any time or times during the term of this lease, *the land demised, or any part or parts thereof, may at the option of the Lessor,* on behalf of the Territory of Hawaii, or any person or persons, corporation or corporations, *be withdrawn* from the operation of this lease for homestead or settlement purposes, or for storing, conserving, transporting and conveying water for any purpose, or for reclamation purposes, or for forestry purposes, or for telephone, telegraph, electric power, railway or roadway purposes, *or for any public purpose,* or for sale for any purpose for which land may be sold under the provisions of Section 73 of the Hawaiian Organic Act as now or hereafter amended, and possession resumed by the Lessor, in which event the land so with-

> drawn shall cease to be subject to the terms, covenants and conditions of this lease, and the rent hereinabove reserved shall be reduced in proportion to the value of the part so withdrawn. [Italics added.]

Under date of July 2, 1942, the Territory's Commissioner of Public Lands wrote petitioners that pursuant to the request of Lieutenant General Delos C. Emmons to the Governor of the Territory all of the land covered by Lease 1740 "is hereby withdrawn from the operation thereof for public purpose, to wit: For use by the Army for war purposes" and that accordingly the lease was cancelled as of June 29, 1942 (R. 33, 34).

Lease 1741 began and was to have ended at the same time as No. 1740. It contained the same cancellation clause (R. 36). It was cancelled as of December 29, 1942, for the same reason as No. 1740 (R. 37).

The trial court found that petitioners had sustained damages of $65,894.29, of which $18,244 resulted from the escape and destruction of livestock, $190 from loss of bags, beans and redwood posts, and $47,460.29 from cancellation of the leases (R. 14-18). Judgment was entered for that amount (R. 18-20). The Court of Appeals reversed, except as to the item of $190, the award of which was not contested by the Government (see R. 406). It held that the livestock losses arose out of combat activities (R. 407-410) and that the

leases were lawfully cancelled pursuant to (a) section 91 of the Hawaiian Organic Act, approved April 30, 1900, 31 Stat. 141, 159, as amended, 48 U.S.C. sec. 511, and (b) the withdrawal clauses of the leases (R. 410-419).

ARGUMENT

1. Petitioners object (Pet. 13-15) to the holding below (R. 407-410) that their livestock losses arose out of combat activities, losses which were expressly made non-compensable by the proviso to section 1 of the jurisdictional Act (pp. 2-3, *supra*). The Court of Appeals pointed out that the loss and dispersal of the livestock occurred in the days immediately subsequent to the bombing of Pearl Harbor; that at that time the military activities on the ranch were confined to the erection of barbed wire entanglement and the guarding and patrolling of the beach, in view of the possibility of invasion, air or sea raids, etc.; that, militarily, the situation in the Islands was then of the gravest emergency; that the troop movements and activities here involved were not remote in time and place from a zone of actual combat, but represented rather the response of the military to counter what was felt to be a present threat; and hence that the activities resulting in the losses here constituted "combat activities of military personnel of the United States." (R. 408-410.)

We submit that this conclusion is supported both by the facts of the case and the clear terms

of the statute. Here, as in the court below, petitioners lay great stress upon the House committee report recommending enactment of the legislation. (H. Rep. No. 2063, 80th Cong., 2d sess., p. 4, quoted in Petition, pp. 13-14). It cannot be denied that the interpretation of the proviso made by the Court of Appeals is probably contrary to the understanding of the members of the committee, as expressed in the report. But we think the court below gave the correct answer to petitioners' argument in this regard. The court stated that, notwithstanding the views expressed in the House committee report, "the court is obliged to apply the Act as it is written. Its terms are too plain to permit of recourse to extraneous evidence of the legislative intent." (R. 410, footnote 1.) This is an appropriate case for applying the canon of construction that special jurisdictional acts, passed at the instance of private claimants, are to be strictly construed against the claimant and in favor of the United States. *United States* v. *Goltra,* 312 U. S. 203, 210; *Klamath Indians* v. *United States,* 296 U. S. 244, 250. The committee report apart, there can be little doubt that these activities were "combat activities" and clearly within the words of the statute. Moreover, Section 2 of the Act expressly provides that it "shall be construed only to waive the immunity from suit of the Government of the United States and to confer jurisdiction upon said court * * * *and not otherwise to*

affect any substantive rights of the parties" (pp. 3-4, *supra;* italics supplied). In the face of this plain language, petitioners would construe the Act as affecting the substantive rights of the United States by settling the issue of liability and leaving to the court only the duty of assessing the damages. We agree with the court below that, with all deference and respect to the views stated in the House committee report, petitioners' interpretation would do violence to the language of the statute. In any event, the question is limited in its importance and effect to this particular private statute, applicable only to these petitioners. The matter plainly is not one of general importance warranting review by this Court.

2. Section 91 of the Hawaiian Organic Act, approved April 30, 1900, 31 Stat. 141, 159, as amended, 36 Stat. 443, 447, 48 U.S.C. sec. 511, provides:

> except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation * * * shall * * * remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. * * *

The lands covered by the two leases were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation (see R. 411). As stated above (p. 7, *supra*), by direction of the Governor of Hawaii they were withdrawn from petitioners for public purposes. Accordingly, as the Court of Appeals held (R. 413-417), the leases were lawfully cancelled and petitioners were not entitled to damages under the Jurisdictional Act. *United States* v. *Chun Chin,* 150 F. 2d 1016 (C. A. 9).

(a) Petitioners' contention (Pet. 6-11) that section 91 does not apply is premised on the fact that section 73(c) of the Organic Act, 48 U.S.C. sec. 664, continued in force the public land laws of Hawaii and that pursuant to these laws the leases were made by the territorial Commissioner of Public Lands to whom section 73(q) of the same Act, 48 U.S.C. sec. 677, entrusted the management and disposition of all lands in the possession, use, and control of the Territory.

But the fact that the leases were lawfully made does not show they were unlawfully terminated. Subsections (c) and (q) of section 73 are silent as to the power to withdraw reserved by section 91 and therefore do not purport to affect that power. Neither does section 4544 of the Revised Laws of Hawaii, 1945, which according to petitioners (Pet. 7, fn. 3(d)) authorized the making of these two

21-year general leases.[2] The argument (Pet. 8-10), that lands leased by the Territory are no longer in its "possession" and that only lands in the possession of the Territory can be withdrawn for the uses and purposes of the United States is dissipated by a mere reading of section 91. The section provides only that lands transferred to the United States by Hawaii under the joint resolution of annexation shall remain under the possession, use, and control of the Territory "until" the occurrence of one or the other of two events: either Congress disposes of them or they are taken for the uses and purposes of the United States. Obviously an interim lease by the Territory does not remove them from the reach of the United States.

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[2] Section 4544 provides:

> Except as provided in section 4542, and subject to the approval of the board of public lands when required by section 4541, the commissioner may at his discretion make general leases of public lands for any number of years, not to exceed twenty-one, at public auction, but no such lease shall contain a privilege of renewal nor be made for any land already under a lease which has more than two years to run, nor shall a general lease or transfer of general lease of public lands be made to a person in arrears in payment of taxes, rents or other obligations due the Territory or any political subdivision thereof, and persons so in arrears shall be disqualified to bid at sales of such leases. In no case shall it be lawful to collect rents on any such lease for more than one year in advance or to receive anything in the nature of a bonus for executing the same. Any such payment and receipt of rents for more than one year in advance or of such bonus shall render void the lease on account of which such advance rent or bonus is paid, upon proof thereof before any court having jurisdiction in such a case.

(b) As the court below held (R. 417-418) the provisions of section 91 must be read into the leases. In addition, the leases expressly reserved the power to withdraw the lands "for any public purpose". Since this phrase follows the enumeration of a number of specified purposes for which the Territory might desire the lands, petitioners contend (Pet. 9-10) that it provides only for withdrawals for any public purpose of the Territory. There is no warrant for such a limitation. The fact that the Territory reserved the right to cancel the leases for purposes of its own does not indicate that it intended to overlook or exclude the right of the United States to cancel such leases for federal purposes. In all probability, the fact that the United States had such broad powers of cancellation induced the Territory to specify so many additional contingencies for it exercising the same power. Moreover, there is no basis for the view that the withdrawal was not for a territorial purpose. As the court below pointed out (R. 418) it is not "rational to divorce entirely the public purposes of the Territory from those of the United States. Often their interests are indistinguishable, as in a vital sense they were here".

There is no warrant for petitioners' repeated assertions (Pet. 2, 6, 8, 9, 11, 15) that the decision of the Court of Appeals casts a cloud upon property interests in Hawaii derived from lands gov-

erned by section 91 of the Hawaiian Organic Act. Section 91 is plain and—contrary to their intimations (Pet. 6)—has never been interpreted as they contend. So far as is known, its meaning has been drawn in question but once and on that occasion it was given the same construction as here. *United States* v. *Chun Chin,* 150 F. 2d 1016 (C.A. 9). When regard is had to the fact (Pet. 11; see also Pet. 8, fn. 3a) that the withdrawal clauses contained in their two leases are "standard" in territorial leases, it is apparent that wholly apart from section 91, lessees from the Territory could be divested of their leaseholds for any of a great number of reasons. If, therefore, petitioners believed that their leases could not be cancelled for the uses and purposes of the United States, the effect of the decision below is merely to make them—and similar lessees—aware that leases of lands in the possession of the Territory pursuant to section 91 may be cancelled for one more reason than they had supposed.[3]

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[3] In the court below the Territory of Hawaii filed a brief as amicus curiae in support of the petition for rehearing. This brief challenged only the conclusion of the Court of Appeals on the section 91 point. The brief (p. 3) expressly stated that the Territory did not contest the court's interpretation of the withdrawal clauses embodied in the leases here involved, and that the result here is adequately supported by the latter ground.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH
Assistant Attorney General.

JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys.

JULY 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 141

A. LESTER MARKS, ELIZABETH LOY MARKS AND HERBERT M. RICHARDS, TRUSTEES OF THE ESTATE OF L. L. MCCANDLESS, DECEASED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of October 8, 1951, denying the petition for writ of certiorari and that a writ issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above cause as prayed for in the petition filed June 23, 1951.

Reasons for Granting Rehearing and Issuing the Writ

(1) This case involves a determination by the court below of a large question involving the administration of the land laws of the Territory of Hawaii. The Attorney General of Hawaii who was not a party and has not been

heard in any court should be given the opportunity to demonstrate to this Court that the construction placed on the Hawaiian Organic Act by the court below is contrary to the settled interpretation of that act for the past fifty years and casts a cloud on thousands of transactions and titles to public lands in Hawaii which judgment if uncorrected will result in great mischief in the administration of our public lands.

(2) The Attorney General of Hawaii did not appear in the court below but filed a brief after the opinion in support of our petition for rehearing. When petitioners filed their petition for writ of certiorari in this Court the Attorney General of Hawaii filed a brief in support of it which was dated, Honolulu, September 20, 1951. Counsel for petitioners does not know whether the brief of the Attorney General of Hawaii was distributed in time for consideration by this Court.

(3) This is a case where the usual criterion of a conflict among circuits cannot possibly arise since any question involving titles clouded as a result of the judgment below could of necessity only reach the Court of Appeals for the Ninth Circuit and no other Court of Appeals, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 (1938).

(4) Although this suit is brought under a private act it involves an issue of great public importance to the people of the Territory of Hawaii. The fact that the Hawaiian Organic Act is applicable only in a limited geographical area and that the interest in real estate created thereunder can only be tested in the Court of Appeals for the Ninth Circuit should not deprive petitioners of a hearing on this critical issue.

Conclusion

For the reasons set forth above and in the writ of certiorari, it is respectfully urged that a rehearing be granted

and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, October 20, 1951.

Respectfully submitted,

J. GARNER ANTHONY,
Counsel for A. Lester Marks,
Elizabeth Loy Marks and Herbert M. Richards,
Trustees of the Estate of L. L. McCandless,
Deceased, Petitioners.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

J. GARNER ANTHONY,
Counsel for Petitioners.

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No. 141

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

A. LESTER MARKS, ELIZABETH LOY MARKS and HERBERT M. RICHARDS, Trustees of the Estate of L. L. McCandless, Deceased,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE TERRITORY OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

WALTER D. ACKERMAN, JR.
Attorney General of the Territory of Hawaii

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Deputy Attorney General of the Territory of Hawaii
On Behalf of the Territory of Hawaii as Amicus Curiae

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE TERRITORY OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (R. 404-420) is reported at 187 F. 2d 724. The findings of fact and conclusions of law of the District Court (R. 14-18) are unreported.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered March 5, 1951 (R. 420-421). A petition for rehearing was denied on May 15, 1951 (R. 421). The petition for a writ of certiorari was filed on June 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

INTEREST OF THE AMICUS CURIAE IN THIS CASE

The Territory is interested only in the first of the four errors urged by the petition (Pet. 5), namely:

> "The Court of Appeals erred:
> (1) In holding that Sec. 91 of the Hawaiian Organic Act permitted the United States to take petitioners' leaseholds of public lands without compensation;".

The interest of the amicus lies in the fact that Congress, in the exercise of its power over the lands ceded to the United States by the Republic of Hawaii and in conformity with the terms of the cession, has enacted laws vesting in officers of the Territory of Hawaii wide powers of management of the public lands of Hawaii, including power to make leases for a maximum number of years specified by such laws, as well as the power of sale for certain purposes. These laws are special laws governing the public lands of Hawaii in lieu of the land laws of the United States, and under them the management of the public lands of Hawaii is centered in the territorial land office in lieu of the Bureau of Land Management of the United States. The opinion below holds that by reason of section 91 of the Hawaiian Organic Act, which provides that the Territory's powers of management may be ter-

minated and the land taken for military or other federal use, the rights of the Territory's lessees are vitiated whenever such use is decided upon. This is contrary to the principle well established in this Court, that contract rights, acquired in the public domain under the laws of the United States, are good against a subsequent order withdrawing the land from availability under said laws.

This well established principle does not mean that ceded lands under lease cannot be taken for military or other federal use pursuant to section 91 of the Hawaiian Organic Act. It does mean that unless authority to cancel the lease can be found within the four corners of the contract itself, the land so taken is subject to an encumbrance which is property within the meaning of the Fifth Amendment.

The Territory of course does not contest the applicability of the withdrawal clause contained in the leases here involved, relied upon by the territorial land office as its authority for the cancellation of these leases. But the granting or denial of certiorari should not turn upon the question whether the petitioners will be successful in contesting the applicability of that clause, because the court below has decided in a way in conflict with the applicable decisions of this Court a question of fundamental importance in the administration of the public land system of Hawaii.

QUESTION PRESENTED

When Congress (A) has authorized the Commissioner of Public Lands of the Territory of Hawaii to manage the public lands, including the specific power of leasing the same for a term of twenty-one years, and (B) has authorized the Governor of Hawaii or the President to terminate such management and take land for military or other federal

use, does the exercise of authority under "(B)" vitiate a leasehold already created under the authority of "(A)"?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the appendix or footnotes.

STATEMENT

The case is stated in the petition (Pet. 3-5) and brief in opposition (Br. Opp. 4-8). One further matter is important, that is, that the opinion below in effect attributes to the Governor of Hawaii an act which he did not do and would not have done, namely to take without compensation leaseholds made by the Commissioner of Public Lands of the Territory. All that the Governor did was to take the lands from the land office's management for the use of the United States after the leases were cancelled by the land office, which relied for its authority on the provisions of the leases themselves. (R. 34-37, 411-412.) Had the leases not been so cancelled the Governor would have noted them in the executive order setting the land aside for the use of the United States.[1]

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[1] This was done in at least two instances:

(1) In Executive Order 1038, issued on November 18, 1943, which was for the land involved in *United States v. Chun Chin,* 150 F. 2d 1016, the executive order recited that the United States, on September 5, 1940 in Civil No. 430, had filed a Judgment on Declaration of Taking, and that at the date of said filing "the status of said land was • • • that the Territory of Hawaii had executed • • • General Lease No. 2515 to Chun Chin."

(2) In Executive Order No. 1284, issued on November 26, 1948 after correspondence between the Territory and the Department of the Navy and Department of Justice as to the form of this order, land was set aside for the use of the United States:

> "Subject to such rights, if any, as may be enjoyed under General Leases 2306 and 2516 issued by the Commissioner of Public Lands."

ARGUMENT

1. As a preliminary to the argument it must be noted that the authority of the Commissioner of Public Lands of the Territory of Hawaii to lease these lands for a term of twenty-one years, is unquestioned. (Br. Opp. 11.) Such authority was conferred by Congress by this chain of events:

(a) By the terms of the cession of such land to the United States by the Republic of Hawaii it was provided that:

> "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition."[2]

(b) By the Hawaiian Organic Act, as enacted by the Act of April 30, 1900[3] Congress enacted "special laws" for the ceded public lands by continuing in force the "laws of Hawaii",[4] defined as meaning the laws of the Republic of Hawaii.[5] Congress likewise continued the appropriate territorial officers in the exercise of the powers conferred by the laws so continued in effect.[6]

(c) Among the laws of the Republic of Hawaii so continued in force was a section providing for general leases to be made at public auction for a term not to exceed twenty-one years.[7]

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[2] Resolution of the Senate of the Republic of Hawaii ratifying the Treaty of Annexation of 1897; Newlands Resolution, 30 Stat. 750, App. pp. 1-2.

[3] 31 Stat. 141, c. 339. Relevant portions of the Organic Act as enacted in 1900 appear in the appendix, pp. 2-4. These same provisions as they read today appear in the appendix, pp. 4-8.

[4] Sec. 73, App. pp. 3, 4.

[5] Sec. 1, App. p. 2.

[6] Sec. 73, App. pp. 3, 5.

[7] Section 203 of the Civil Laws of 1897, now section 4544 of the Revised Laws of Hawaii 1945, App. p. 10.

2. Congress having authorized a lease for a term of years, the leasehold made under that authority was a contract right entitled to the protection of the Fifth Amendment.[8] When the Solicitor General says: "But the fact that the leases were lawfully made does not show that they were unlawfully terminated," and then refers to the "power to withdraw reserved by section 91" (Br. Opp. 11), he assumes that in section 91 Congress provided for the withdrawal of the land from the lease, which is the point in issue. The assumption is unjustified. Section 91 simply reserves to the Governor of Hawaii and the President the power to take the land from the management of the territorial land office for the use of the United States.[9] A similar power of the President to take land from the Bureau of Land Management is contained in the laws of the United States governing the public domain on the mainland of the United States in the Act of June 25, 1910.[10] Under ordinary prin-

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[8] *Lynch v. United States,* 292 U.S. 571.

[9] Section 91 provides:

"• • • the public property ceded and transferred to the United States by the Republic of Hawaii • • • shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until • • • taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii • • •."

(32 Stat. 141, c. 339, Sec. 91.)

The full section 91 appears in the appendix at p. 4 as originally enacted, and at pp. 7-8 as the section reads today.

[10] 36 Stat. 847, section 1; 43 U.S.C. 141, as follows:

"Section 141. Withdrawal and reservation of lands for water-power sites or other purposes. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classificaiton of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

ciples of agency such power of one officer to take land from the management of another officer does not contemplate the cancellation of contract rights conferred by the former in the execution of his authority before the land was withdrawn from his management.

In the decisions of this Court it is well established that when, under the laws of the United States, a right is acquired in public land before the President withdraws such land from aavilability under said laws, the right is good against the subsequent withdrawal of the land; the statutory authority for such withdrawal is not read into the law authorizing the right as a limitation upon the acquisition of the right. Whether the events preceding the actual withdrawal of the land reached fruition in a contract right has been this Court's only concern in such cases.[11] In some instances the executive order making the withdrawal from the public domain has contained specific exceptions to preserve uncompleted entries that were only inchoate rights, and in reaching the holding that inchoate rights were intended to be preserved this Court has pointed out that a vested right "obviously" needs no exception to preserve it.[12]

The War Department, as well as the Territory, has construed territorial leases as good against subsequent with-

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[11] *Payne v. Central Pacific Ry. Co.*, 255 U.S. 228 (1921), and *Wyoming v. United States*, 255 U.S. 228 (1921), involving withdrawals from the public domain made by the President under the Act of June 25, 1910, quoted in note 10 supra. See also *United States v. Fitzgerald*, 15 Pet. 407 (1841); *Payne v. New Mexico*, 255 U.S. 267 (1921), and *United States v. Midwest Oil Co.*, 236 U.S. 459, 477.

[12] *Stockley v. United States*, 260 U.S. 532, 544 (1923). Section 2 of the Act of June 25, 1910, cited in note 10, preserves uncompleted entries and other inchoate rights when land is withdrawn from settlement.

drawals for military purposes[13] and the Solicitor General (Br. Opp. 14) errs in asserting that section 91 has never been interpreted as petitioners contend. The opinion below, for the first time,[14] holds that a withdrawal from the public domain for federal use in itself divests existing contract rights. The court should have held that the power of termination must be found within the four corners of the contract.

3. When the contract is to contain a provision for the foreshortening of the lease for public purposes, the land laws of Hawaii so state. There are two such provisions, both of them specific and of restricted application,[15] from which

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[13] In reporting on the bill that became the Act of June 19, 1930 (46 Stat. 789, c. 546) the War Department, in support of its retention of Hawaiian ceded lands set aside for its use but subsequently rented by it to private persons, took the position that if the lands were returned to the Territory it would not be assured of having them when it needed them, *because the land would be placed under a lease by the Territory and could not be withdrawn therefrom.* The solution worked out by the bill was to cover into the Treasury of the Territory the rentals received by federal departments.

The War Department's report is printed at p. 38 of the appendix to the amicus brief in support of the petition for rehearing in the court below, which was transmitted to this Court with the record. The committee report on the bill appears at pp. 35-39 of the appendix to that brief.

[14] *United States v. Chun Chin,* 150 F. 2d 1016, C.A. 9th 1945, (Br. Opp. 11, 14) did not pass on this point. Indeed, the court below said that the *Chun Chin* case did not involve the question of the lessee's right to compensation (R. 417). That case held that the United States could not condemn public land that had been ceded to it by the Republic of Hawaii, that the government erred in filing a declaration of taking for such land instead of seeking an executive order, that the government should have been allowed to rectify this error by vacating the judgment on the declaration of taking as it sought to do, and that since according to the record the lessee's possession had not been disturbed, the motion to vacate the judgment on the declaration of taking was timely.

[15] (1) Section 73 (d) of the Organic Act relates to leases of agricultural lands. It was added in 1908 (Act of April 2, 1908, 35 Stat. 56, c. 124) to take care of a matter held in abeyance in the original act when Congress cut the term of agricultural leases to five years

it again appears that section 91's general provisions are not intended to cover this subject matter, that on the contrary section 91 is a mere provision for termination of the land office's management.

"until Congress shall otherwise direct." (Act of April 30, 1900, 31 Stat. 141, c. 339, s. 73.) In 1908 Congress permitted fifteen year terms, subject to the requirement that the lease provide:

> "The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced * * *."

By the Act of July 9, 1921, 42 Stat. 116, c. 42, Congress permitted the omission of this withdrawal provision from leases of sugar cane lands; there was added a proviso that the land commissioner, with the approval of the governor and board of public lands:

> "may * * * omit such withdrawal provision from the lease of any lands suitable for the cultivation of sugar cane whenever he deems it advantageous to the Territory of Hawaii. Land so leased shall not be subject to such right of withdrawal."

The full section 73 (d) is printed in the appendix, pp. 5-6.

(2) Section 188 of the Civil Laws of 1897, continued in effect by Congress and now part of section 4543, Revised Laws of Hawaii 1945, provides:

> "* * * leases of public lands * * * may contain a proviso that the Government may at any time with reasonable notice and without compensation, except for improvements taken, take possession of any part of the premises covered by such leases which may be required for laying out and constructing new roads or improving or changing the line or grade of old roads, * * *." (The full section is printed in the appendix, p. 9.)

This section is inexplicable under the theory of the court below that a provision for taking public land from land office management for public use in itself contemplates the foreshortening of leases. Withdrawal of land from land office management for roads and other territorial purposes elsewhere is provided for by a separate section which parallels section 91's provision for such withdrawals for federal purposes. Originally this was section 186 of the Civil Laws of 1897, which was continued in effect by Congress until it was superseded in 1910 (Act of May 27, 1910, 36 Stat. 444, c. 258) by an amendment of section 73 of the Organic Act inserting in that section a provision for orders setting aside land for public purposes, now subsection (q) of section 73. This legislative history is more fully reviewed at pp. 18-20 of the amicus brief filed in support of the petition for rehearing in the court below and transmitted to this Court with the record.

These two specific provisions for the foreshortening of leases are not the same sections that confer the power to lease. In contrasting the latter sections with section 91 (Br. Opp. 1), the Solicitor General does not reach the problem.

4. The ninth circuit's departure from established principle is not cured by the argument that only territorial leases are affected, and these usually contain clauses whereby power of termination of the leases for public use can be found within the four corners of the contracts (Br. Opp. 13-14).[16] By this argument the Solicitor General places outside the reach of section 91 the Territory's contracts of sale and contracts conferring options of purchase, to which the petition refers. (Pet. 7, note 3.)[17] These contain no express withdrawal clause and to the contrary often expressly require that improvements be made by those dealing with the Territory, in order to assure the carrying out of the policies of Congress in respect of the purposes for which public lands may be privately acquired. Use of the decision below to effect forfeitures of such contracts would impose extreme hardship. Moreover, in 1946 (Act of August 7, 1946, 60 Stat. 871, c. 771) Congress made an amendment of section 73 of the Organic Act which assumes and thereby recognizes that the Hawaiian agreements of sale create vested rights good against later military needs.[18]

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[16] However, there are outstanding about forty-five easements for twenty-one year terms without withdrawal clauses.

[17] The types of contracts and statutory authority therefor are reviewed in the petition and at pp. 3-7, 23 (note 31), and 25-26 of the amicus brief filed in the court below in support of the petition for rehearing and transmitted to this Court with the record.

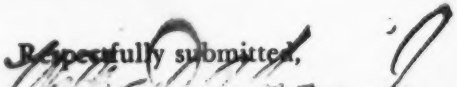
[18] This is explained at pp. 23-24 of the amicus brief filed in support of the petition for rehearing in the court below and transmitted to this Court with the record. The cited 1946 act and Committee Report thereon are printed at pp. 42-46 of the appendix to that brief.

Such circumstances should be considered by this Court. They emphatically show that contract rights are outside the reach of section 91. In asking this Court to proceed on the basis of a differentiation that assumes inapplicability to contracts other than leases of the Court's statement "the provisions of section 91 must in any event be read into the contracts" (R. 417) the Solicitor General does not explain why it is wrong to say this of contracts other than leases and at the same time right to say it of leases. The opinion is a cloud upon public land transactions in Hawaii and should not be left in effect.

CONCLUSION

Certiorari should be granted for the review of that portion of the judgment denying compensation for the cancellation of the territorial leases.

Respectfully submitted,



WALTER D. ACKERMAN, JR.
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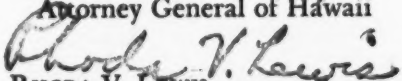

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September 20, 1951

APPENDIX

TERMS OF THE CESSION OF PUBLIC LANDS BY THE REPUBLIC OF HAWAII TO THE UNITED STATES

Excerpt from the Resolution of the Senate of Hawaii ratifying the treaty of annexation of 1897:

ARTICLE II

The Republic of Hawaii also cedes and hereby transfers to the United States the absolute fee and ownership of all public, government or crown lands, public buildings or edifices, ports, harbors, military equipments and all other public property of every kind and description, belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition. Provided, that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Excerpt from the Newlands Resolution entitled "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States":

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, That

said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes. (Resolution No. 55 of July 7, 1898, 30 Stat. 750.)

Relevant provisions of the Hawaiian Organic Act, as originally enacted by the Act of April 30, 1900, 31 Stat. 141, c. 339

Sec. 1. That the phrase "the laws of Hawaii" as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America.

The constitution and statute laws of the Republic of Hawaii then in force, set forth in a compilation made by Sidney M. Ballou under the authority of the legislature, and published in two volumes entitled "Civil Laws" and

"Penal Laws," respectively, and in the Session Laws of the Legislature for the session of eighteen hundred and ninety-eight, are referred to in this Act as "Civil Laws," "Penal Laws," and "Session Laws."

Sec. 73. That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, shall continue in force until Congress shall otherwise provide. That, subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the seventh day of July, eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent"; "commissioner of public lands" for "minister of the interior," "agent of public lands," and "commissioner of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared by intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received letters of denization under the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of Hawaii." And no lease of agricultural land shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct. All funds arising from the sale or lease or other disposal of

such lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight: Provided, There shall be excepted from the provisions of this section all lands heretofore set apart, or reserved, by Executive order or orders, by the President of the United States.

Sec. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii.

Relevant provisions of the Hawaiian Organic Act as it reads today

(Amendments, and references to Title 48 of the U. S. Code, are cited at the end of each section)

Sec. 1. [This section reads as originally enacted and now is 48 U.S.C. 493].

Sec. 73 (c). The laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land commission awards, except as changed by this Act,

shall continue in force until Congress shall otherwise provide. Subject to the approval of the President, all sales, grants, leases, and other dispositions of the public domain, and agreements concerning the same, and all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between the 7th day of July, 1898, and the 28th day of September, 1899, are hereby ratified and confirmed. In said laws "land patent" shall be substituted for "royal patent"; "commissioner of public lands," for "minister of the interior," "agent of public lands," and "commissioners of public lands," or their equivalents; and the words "that I am a citizen of the United States," or "that I have declared my intention to become a citizen of the United States, as required by law," for the words "that I am a citizen by birth (or naturalization) of the Republic of Hawaii," or "that I have received letters of denization under the Republic of Hawaii," or "that I have received a certificate of special right of citizenship from the Republic of Hawaii." (as am. April 2, 1908, 35 Stat. 56, c. 124; May 27, 1910, 36 Stat. 444, c. 258; July 9, 1921, 42 Stat. 117, c. 42; 48 U.S.C. 664.)

Sec. 73 (d). No lease of agricultural lands or of undeveloped arid public land which is capable of being converted into agricultural land by the development, for irrigation purposes, of either the underlying or adjacent waters, or both, shall be granted, sold, or renewed by the government of the Territory of Hawaii for a longer period than fifteen years. Each such lease shall be sold at public auction to the highest bidder after due notice as provided in subdivision (i) of this section and the laws of the Territory of Hawaii. Each such notice shall state all the terms and con-

ditions of the sale. The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced in proportion to the value of the part so withdrawn. Every such lease shall contain a provision to that effect: Provided, That the commissioner may, with the approval of the governor and at least two-thirds of the members of the land board, omit such withdrawal provision from the lease of any lands suitable for the cultivation of sugar cane whenever he deems it advantageous to the Territory of Hawaii. Land so leased shall not be subject to such right of withdrawal. (as am. April 2, 1908, 35 Stat. 56, c. 124; May 27, 1910, 36 Stat. 444, c. 258; July 9, 1921, 42 Stat. 117, c. 42; 48 U.S.C. 665.)

Sec. 73 (e). All funds arising from the sale or lease or other disposal of public land shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation, approved July 7, 1898. (as am. April 2, 1908, 35 Stat. 56, c. 124; May 27, 1910, 36 Stat. 444, c. 258; July 9, 1921, 42 Stat. 117, c. 42; 48 U.S.C. 666.)

Sec. 73 (q). All lands in the possession, use, and control of the Territory shall hereafter be managed by the commissioner, except such as shall be set aside for public purposes as hereinafter provided; all sales and other dispositions of such land shall be made by the commissioner or under his direction, for which purpose, if necessary, the land may be transferred to his department from any other department

by direction of the governor, and all patents and deeds of such land shall issue from the office of the commissioner, who shall countersign the same and keep a record thereof. Lands conveyed to the Territory in exchange for other lands that are subject to the lands laws of Hawaii, as amended by this Act, shall, except, as otherwise provided, have the same status and be subject to such laws as if they had previously been public lands of Hawaii. All orders setting aside lands for forest or other public purposes, or withdrawing the same, shall be made by the governor, and lands while so set aside for such purposes may be managed as may be provided by the laws of the Territory; the provisions of this paragraph may also be applied where the "public purposes" are the uses and purposes of the United States, and lands while so set aside may be managed as may be provided by the laws of the United States. The commissioner is hereby authorized to perform any and all acts, prescribe forms of oaths, and, with the approval of the governor and said board, make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this section and the land laws of Hawaii into full force and effect. * * * (as am. April 2, 1908, 35 Stat. 56, c. 124; May 27, 1910, 36 Stat. 444, c. 258; July 9, 1921, 42 Stat. 117, c. 42; August 21, 1941, 55 Stat. 658, c. 394; 48 U.S.C. 677.)

Sec. 91. That, except as otherwise provided, the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and

shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii. And any such public property so taken for the uses and purposes of the United States may be restored to its previous status by direction of the President; and the title to any such public property in the possession and use of the Territory for the purposes of water, sewer, electric, and other public works, penal, charitable, scientific, and educational institutions, cemeteries, hospitals, parks, highways, wharves, landings, harbor improvements, public buildings, or other public purposes, or required for any such purposes, may be transferred to the Territory by direction of the President, and the title to any property so transferred to the Territory may thereafter be transferred to any city, county, or other political subdivision thereof by direction of the governor when thereunto authorized by the legislature; Provided, That when any such public property so taken for the uses and purposes of the United States, if instead of being used for public purpose, is thereafter by the United States leased, rented, or granted upon revocable permits to private parties, the rentals or consideration shall be covered into the treasury of the Territory of Hawaii for the use and benefit of the purposes named in this section. (as am. May 27, 1910, 36 Stat. 447, c. 258; June 19, 1930, 46 Stat. 789, c. 546; 48 U.S.C. 511.)

Relevant provisions of the land laws of Hawaii, as set forth in the Revised Laws of Hawaii 1945

Sec. 4541:

[This sets forth a provision of section 73 (l) of the Organic Act that: "No lease of agricultural lands exceeding forty acres in area, or of pastoral or waste lands exceeding two hundred acres in area, shall be made without the approval of two-thirds of the board of public lands."].

Sec. 4542:

[This sets forth the provisions of section 73 (d) of the Organic Act, supra].

Sec. 4543, derived from section 188 of the Civil Laws of 1897, continued in effect by Congress:

Sec. 4543. *Taking leased lands for public road, when.* Except as otherwise provided in section 4542, all leases of public lands in the classes of agricultural, pastoral and pastoral-agricultural lands may contain a proviso that the government may at any time with reasonable notice and without compensation, except for improvements taken, take possession of any part of the premises covered by such leases which may be required for laying out and constructing new roads or improving or changing the line or grade of old roads, and take from such premises soil, rock and gravel as may be necessary for the construction or improvement of such roads; provided, that such privilege of taking without compensation shall not extend to such parts of such premises as are under cultivation with annual crops or sugar until such crops shall be harvested, nor to such parts of such premises as are planted and cultivated with coffee, fruit trees or other perennial crops, or occupied or

improved with permanent improvements, except fences. [L. 1895, c. 26, s. 4; am. L. 1898, c. 42, s. 1.]

Section 4544, derived from section 203 of the Civil Laws of 1897, continued in effect by Congress:

Sec. 4544. *Conditions for making or transfer.* Except as provided in section 4542, and subject to the approval of the board of public lands when required by section 4541, the commissioner may at his discretion make general leases of public lands for any number of years, not to exceed twenty-one, at public auction, but no such lease shall contain a privilege of renewal nor be made for any land already under a lease which has more than two years to run, *nor shall a general lease or transfer of general lease of public lands be made to a person in arrears in payment of taxes, rents or other obligations due the Territory or any political subdivision thereof, and persons so in arrears shall be disqualified to bid at sales of such leases.* In no case shall it be lawful to collect rents on any such lease for more than one year in advance or to receive anything in the nature of a bonus for executing the same. Any such payment and receipt of rents for more than one year in advance of such bonus shall render void the lease on account of which such advance rent or bonus is paid, upon proof thereof before any court having jurisdiction in such a case. [L. 1895, c. 26, s. 19; am. imp. Org. Act, s. 73.]

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* The portion of this section between asterisks was added by Act 132 of the Session Laws of Hawaii 1933.